

WILMERHALE

September 16, 2010

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Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
Room TW-A325  
445 12th Street, SW  
Washington, DC 20554

FILED/ACCEPTED

SEP 16 2010

Federal Communications Commission  
Office of the Secretary

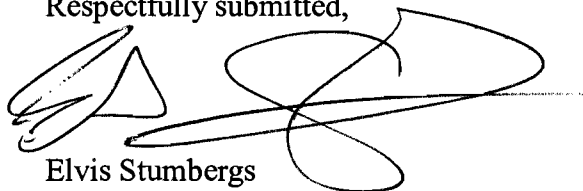
Re: **Qwest Corporation Motion to Modify Protective Orders**  
**WC Docket Nos. 04-223, 05-281, 06-109, 06-172, 07-97**

Dear Ms. Dortch:

Please see attached a copy of Qwest Corporation's Motion to Modify Protective Orders in the above referenced dockets. This motion has already been submitted through ECFS in all dockets except WC Docket No. 07-97. ECFS indicated that WC Docket No. 07-97 was not available for "internet filing." Accordingly, we are providing an original and four paper copies to you for inclusion in this docket. I am also providing an additional copy for your office to stamp and return.

Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Elvis Stumbergs

No. of Copies rec'd 044  
List A B C D E

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of  
Petition of Qwest Corporation for Forbearance  
Pursuant to 47 U.S.C. § 160(c) in the Omaha  
Metropolitan Statistical Area

WC Docket No. 04-223

In the Matter of  
Petition of ACS of Anchorage, Inc. Pursuant to  
Section 10 of the Communications Act of 1934,  
as Amended, for Forbearance from Sections  
251(c)(3) and 252(d)(1) in the Anchorage Study  
Area

WC Docket No. 05-281

In the Matter of  
Petition of ACS of Anchorage, Inc. Pursuant to  
Section 10 of the Communications Act of 1934,  
as Amended (47 U.S.C. § 160(c)), for  
Forbearance from Certain Dominant Carrier  
Regulation of Its Interstate Access Services, and  
for Forbearance from Title II Regulation of Its  
Broadband Services, in the Anchorage, Alaska,  
Incumbent Local Exchange Carrier Study Area

WC Docket No. 06-109

In the Matter of  
Petitions of the Verizon Telephone Companies  
for Forbearance Pursuant to 47 U.S.C. § 160(c)  
in the Boston, New York, Philadelphia,  
Pittsburgh, Providence and Virginia Beach  
Metropolitan Statistical Areas

WC Docket No. 06-172

In the Matter of  
Petitions of Qwest Corporation for Forbearance  
Pursuant to 47 U.S.C. § 160(c) in the Denver,  
Minneapolis St.-Paul, Phoenix, and Seattle  
Metropolitan Statistical Areas

WC Docket No. 07-97

## MOTION TO MODIFY PROTECTIVE ORDERS

In each of the above-captioned forbearance proceedings, the Commission redacted certain proprietary information from the publicly accessible versions of its orders. The redacted details of those orders are now highly relevant to Qwest Corporation's appellate challenge to the Commission's recent *Phoenix Order*, which is pending in the Tenth Circuit.<sup>1</sup> Qwest thus requests that the Commission modify the protective orders in these earlier forbearance proceedings so that the parties can see and use, and the Tenth Circuit can review, the unredacted text of the Commission's orders—subject, of course, to the same confidentiality protections that applied in those earlier proceedings. This relief is necessary to ensure that the Tenth Circuit can meaningfully review the *Phoenix Order*, which pervasively discusses, relies upon, and distinguishes those earlier orders. The relief Qwest seeks in this motion is materially the same relief that the Commission granted to Verizon and Qwest, respectively, for purposes of their appeals of the *Qwest 4-MSA Forbearance Order*<sup>2</sup> and the *Verizon 6-MSA Forbearance Order*.<sup>3</sup>

Significantly, every party whose proprietary information appears in the above-captioned forbearance orders consented two years ago to modification of the *same protective orders* in

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<sup>1</sup> Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, AZ Metropolitan Statistical Area*, WC Docket No. 09-135, FCC 10-113 (rel. June 22, 2010) ("*Phoenix Order*"), petition for review pending, No. 10-9543 (10th Cir. filed July 30, 2010).

<sup>2</sup> See Memorandum Opinion and Modified Protective Orders, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, et al.*, 23 FCC Rcd 13500 (2008) ("*Qwest 4-MSA Modification Order*").

<sup>3</sup> See Memorandum Opinion and Modified Protective Orders, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, et al.*, 23 FCC Rcd 1716 (2008) ("*First Verizon 6-MSA Modification Order*"); Memorandum Opinion and Modified Protective Orders, *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, 23 FCC Rcd 11884 (2008) ("*Second Verizon 6-MSA Modification Order*").

connection with Qwest's and Verizon's appeals of the *Qwest 4-MSA Forbearance Order* and the *Verizon 6-MSA Forbearance Order*. Every party has again consented to that same relief for purposes of Qwest's appeal of the *Phoenix Order*, with one exception: Cox Communications, Inc. As discussed below, Cox has offered no plausible rationale for withholding the same consent today that it granted two years ago. Nor could it do so, given that the same safeguards applicable in those earlier proceedings would ensure the continued confidentiality of its relevant data. But one thing is clear: by withholding consent, Cox—which is Qwest's chief competitor in Phoenix—threatens to hinder the Tenth Circuit's review of the Commission's decision to keep Qwest subject to more regulation than Cox.

The Commission should promptly reject Cox's obstructionist position, and grant Qwest the same relief here that, with Cox's consent, the Commission already granted to Qwest and Verizon two years ago in their earlier appeals. Qwest's opening Tenth Circuit brief will likely be due in early November 2010. Qwest thus respectfully asks that the Commission grant the requested relief by October 1, 2010 so that Qwest may have access to the unredacted versions of the Commission's orders while preparing its brief.

1. In the recent Phoenix proceeding, Qwest sought regulatory forbearance under 47 U.S.C. § 160 from certain dominant-carrier and network-sharing obligations on the primary ground that it no longer has a majority market share in Phoenix, the legal standard the Commission had previously used in the *Qwest 4-MSA* and *Verizon 6-MSA Forbearance Orders* to determine eligibility for forbearance relief.<sup>4</sup> The Commission denied the request and, in the

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<sup>4</sup> See Qwest Petition, WC Docket No. 09-135, at 3 (filed Mar. 24, 2009) (“Qwest’s market share, calculated using the Commission’s methodology, has decreased to [redacted], which is substantially less than the 50% market share figure the Commission has previously relied upon.”) (footnotes omitted), citing Memorandum Opinion and Order, *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and*

process, extensively discussed those two orders insofar as they had adopted and applied that standard.

On July 30, 2010, Qwest petitioned for review of the *Phoenix Order* in the United States Court of Appeals for the Tenth Circuit.<sup>5</sup> Qwest plans to argue, among other things, that the *Phoenix Order* unjustifiably diverges from the *Verizon 6-MSA Forbearance Order*, the *Qwest 4-MSA Forbearance Order*, and the three other orders issued in the proceedings captioned above.<sup>6</sup> To that end, Qwest will need to review unredacted versions of those orders and cite in its briefs the actual market-share and other data on which the Commission relied in those orders. The Commission and other parties will need to do the same in order to respond to Qwest's arguments. And the Tenth Circuit will likewise need to have full information about the Commission's precedent in order to assess Qwest's challenge to the *Phoenix Order*.

Accordingly, Qwest requests that the Commission modify the protective orders to grant Qwest and other parties to the Tenth Circuit appeal permission: (i) for their outside appellate and in-house counsel to obtain and review copies of the complete, unredacted versions of the *Qwest*

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*Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729, 11750 ¶ 28 (2008) ("*Qwest 4-MSA Forbearance Order*"); Memorandum Opinion and Order, *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, 22 FCC Rcd 21293, 21309-10 ¶¶ 28-30 & n.99 (2007) ("*Verizon 6-MSA Forbearance Order*") (adopting loss-of-majority-share standard), *remanded*, 570 F.3d 294 (D.C. Cir. 2009).

<sup>5</sup> Petition for Review, *Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. July 30, 2010).

<sup>6</sup> Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance in the Omaha MSA*, 20 FCC Rcd 19415 (2005) ("*Qwest Omaha Order*"), *aff'd*, 482 F.3d 471 (D.C. Cir. 2007); Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958 (2007) ("*ACS Anchorage UNE Forbearance Order*"); Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304 (2007) ("*ACS Anchorage Dominance Forbearance Order*").

*Omaha Forbearance Order*, the *ACS Anchorage UNE Forbearance Order*, and the *ACS Anchorage Dominance Forbearance Order*; (ii) for their outside appellate counsel to obtain and review copies of the complete, unredacted versions of the *Verizon 6-MSA Forbearance Order* and the *Qwest 4-MSA Forbearance Order*; (iii) for their in-house counsel to obtain and review copies of the “confidential,” but not “highly confidential” version of the *Qwest 4-MSA Forbearance Order*;<sup>7</sup> (iv) to provide the Tenth Circuit with unredacted copies of those five orders, filed under seal; and (v) to refer to, and quote from, those unredacted orders in their sealed Tenth Circuit filings. As discussed below, the information would of course remain subject to the same general confidentiality safeguards as before.

2. Qwest does not need further authorization to file the unredacted version of the *Phoenix Order* itself in the Tenth Circuit, since by their terms the protective orders in that proceeding authorize the use of proprietary information on direct review of the Commission’s order *in that proceeding*. Each time a forbearance order is appealed, however, the Commission is routinely asked to modify the protective orders in *other* forbearance proceedings. The Commission routinely grants such relief in order to allow the reviewing court to review the full text of the Commission’s orders in prior forbearance proceedings so that the court can assess claims that the Commission has improperly diverged from its precedent.

In particular, the Commission already has granted materially the same relief sought here to Qwest for purposes of its appeal of the *Qwest 4-MSA Forbearance Order*, and to Verizon for

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<sup>7</sup> The unredacted version of the *Verizon 6-MSA Forbearance Order* contains “highly confidential” information, but no “confidential” information, and thus there is no “confidential” version of the order that can be made available to in-house counsel. See *Qwest 4-MSA Modification Order*, 23 FCC Rcd at 13506 ¶¶ 6-7 nn.21 & 24. As part of its request, Qwest also seeks access to the unredacted version of the D.C. Circuit’s opinion on review of the *Verizon 6-MSA Order*.

purposes of its appeal of the *Verizon 6-MSA Forbearance Order*.<sup>8</sup> In doing so for Qwest, the Commission recognized that “[t]he *Qwest 4 MSA Forbearance Order* relies in part on Commission precedent, including the *Qwest Omaha Forbearance Order*, both *ACS Forbearance Orders*, and the *Verizon 6 MSA Forbearance Order*. All of these orders are based, in part, on factual findings the Commission made in reliance on confidential and/or highly confidential information parties had submitted pursuant to the applicable protective orders in these proceedings.”<sup>9</sup> The same is true of the *Phoenix Order*, which, in addition, also relies on the *Qwest 4-MSA Forbearance Order*. For the same reasons the Commission cited in granting Qwest’s and Verizon’s previous motions, the public interest requires modification of the protective orders for purposes of Qwest’s Tenth Circuit appeal of the *Phoenix Order*.

3. Qwest agrees to the same conditions set out in the Commission’s orders granting its and Verizon’s previous motions. Specifically, Qwest’s outside and in-house counsel will sign confidentiality acknowledgements for the relevant protective orders, as modified to permit the use of non-public information for the limited purpose of Qwest’s Tenth Circuit appeal.<sup>10</sup> Qwest

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<sup>8</sup> For purposes of the *Verizon 6-MSA Forbearance Order* appeal, the Commission modified the protective orders in the *Qwest Omaha Forbearance* proceeding, both *ACS Anchorage Forbearance* proceedings, and the *Qwest 4-MSA Forbearance* proceeding to allow Verizon to use in its appeal confidential and highly confidential information from those proceedings. *First Verizon 6-MSA Modification Order*, 23 FCC Rcd at 1716 ¶ 1; *Second Verizon 6-MSA Modification Order*, 23 FCC Rcd at 11884 ¶ 1. Similarly, the Commission modified the protective orders in the *Qwest Omaha Forbearance* proceeding, both *ACS Anchorage Forbearance* proceedings, and the *Verizon 6-MSA Forbearance* proceeding to permit Qwest to access and use confidential information submitted therein in its *Qwest 4-MSA Forbearance Order* appeal. *Qwest 4-MSA Modification Order*, 23 FCC Rcd at 13500-01 ¶ 1.

<sup>9</sup> *Qwest 4-MSA Modification Order*, 23 FCC Rcd at 13502 ¶ 3. The Commission made similar findings in the context of granting Verizon’s motions. See, e.g., *First Verizon 6-MSA Modification Order*, 23 FCC Rcd at 1717 ¶ 3.

<sup>10</sup> Counsel for any other party that wishes to access or use the confidential information from the Commission’s orders should also be required to sign confidentiality acknowledgements and abide by the terms of the protective orders as modified by the Commission.

also will file under seal the Commission's orders and any briefs or other submissions containing confidential or highly confidential information, and Qwest will not serve the unredacted version of such documents on any party that has not signed the relevant protective orders as modified by the Commission.<sup>11</sup> In essence, the confidential and highly confidential information in these prior proceedings will simply be treated the same as the confidential and highly confidential information in the *Phoenix Order* itself.

4. To facilitate the Commission's review of this motion, counsel for Qwest have sought consent for the requested relief from the fourteen parties whose confidential or highly confidential information appears in the five orders discussed above. *Every party* has granted consent to modification of the protective orders, except Cox. Specifically:

- ACS of Anchorage, Inc., AT&T, and General Communications, Inc. granted consent with respect to the *ACS Anchorage UNE Forbearance Order* and the *ACS Anchorage Dominance Forbearance Order*;
- Charter Communications, Inc., Comcast Cable Communications, LLC, RCN Telecom Services, Inc., Time Warner Cable, Inc., and Verizon granted consent with respect to the *Verizon 6-MSA Forbearance Order*; and
- Comcast Corporation, Integra Telecom, Inc., PAETEC Communications, Inc., Time Warner Telecom Inc., XO Communications, Inc., and McLeodUSA Telecommunications Services, Inc. (via the "18 CLECs" coalition) granted consent with respect to the *Qwest 4-MSA Forbearance Order*.<sup>12</sup>

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<sup>11</sup> See *Qwest 4-MSA Modification Order*, 23 FCC Rcd at 13502-03 ¶ 4.

<sup>12</sup> Integra and tw telecom (formerly Time Warner Telecom) have consented to modification of the protective orders on the condition that Qwest and other parties treat as "highly confidential" (and subject to review by outside counsel only) the Integra and tw telecom information that appears in footnote 134 of the *Qwest 4-MSA Forbearance Order*. See 23 FCC Rcd at 11755-56 ¶ 36 n.134. Integra and tw telecom claim that this information was submitted on their behalf in WC Docket No. 07-97 as "highly confidential" pursuant to the *Second Protective Order*, but that it was designated as merely "confidential" in the *Qwest 4-MSA Forbearance Order*. See Letter from Thomas Jones and Nirali Patel, Counsel for Integra Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 1, 2008); Letter from Thomas Jones and Nirali Patel, Counsel for Time Warner Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed June 30, 2008). In the interest



In stark contrast, Cox—Qwest’s chief competitor in Phoenix—has withheld its consent with respect to the *Verizon 6-MSA Forbearance Order* and the *Qwest 4-MSA Forbearance Order*.<sup>13</sup> Its sole rationale is that, after the D.C. Circuit remanded those orders, “both petitions were withdrawn” at the Commission.<sup>14</sup> This rationale is implausible. As Qwest explained in its correspondence with Cox, the subsequent history of these orders is irrelevant because the Commission pervasively discussed the *Verizon 6-MSA Forbearance Order* and the *Qwest 4-MSA Forbearance Order* in the *Phoenix Order* and relied on and distinguished both to support its conclusion that Qwest was not entitled to forbearance relief in the Phoenix MSA. To understand the relationship among these orders, and to determine whether the *Phoenix Order* unjustifiably departs from precedent, the Tenth Circuit will need to view all three orders in their entirety. This is particularly true with respect to the *Qwest 4-MSA Forbearance Order*, in which the Commission denied Qwest’s first request for forbearance in the same Phoenix MSA that is the subject of the *Phoenix Order*.

Cox’s position is especially perplexing given that it already consented to the use of the unredacted *Qwest 4-MSA* and *Verizon 6-MSA Forbearance Orders* in other judicial review proceedings two years ago, in response to motions that Verizon and Qwest had each filed to modify the respective protective order in the other carrier’s forbearance proceeding. Since then, the proprietary information cited in those earlier orders has almost certainly grown stale. Given

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of ensuring consent, Qwest proposes that this information be treated as highly confidential for purposes of the Tenth Circuit appeal.

<sup>13</sup> Cox has consented to modification of the protective order in the *Qwest Omaha Forbearance Order* proceeding, and thus no party objects to modification of that protective order. See Attach. A (email dated Sept. 3, 2010 from J.G. Harrington, Dow Lohnes PLLC, Counsel to Cox, to Heather Zachary and Elvis Stumbergs, Wilmer Cutler Pickering Hale and Dorr LLP, Counsel to Qwest).

<sup>14</sup> *Id.*

the passage of time, it would necessarily be much less accurate and competitively sensitive now than it was when Cox previously consented to its use. It is unquestionably less competitively sensitive than the more recent proprietary data reflected in the unredacted version of the *Phoenix Order* itself, which Qwest is already authorized to file in the Tenth Circuit. And in all events, no one is seeking to release the older data into the public domain; the data would continue to be subject to the routine, time-tested confidentiality safeguards the Commission applies to all proprietary information. Cox identifies no reason for concern that these safeguards would be inadequate to protect against the improper release of this several-year-old competitive information. But the facts speak for themselves. Cox is the ascendant service provider in Phoenix, and as it well knows, its recalcitrance threatens to hinder the Tenth Circuit's review of the Commission's decision to keep Qwest subject to more regulation than Cox. The Commission should not countenance abuse of its protective order process for such purposes.

Finally, denial of the relief sought here would not only subvert the Tenth Circuit's review authority, but also unreasonably prejudice Qwest's due process rights to judicial review of agency action. *See Morrison v. Warren*, 375 F.3d 468, 473 (6th Cir. 2004) ("[d]ue process requires ... a meaningful opportunity to contest the evidence"); *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1244-45 (2nd Cir. 1990) (procedures satisfy due process if each party has the opportunity to "present pertinent evidence in support of its case"); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773, 780 (9th Cir. 1982) (due process requires that a party "have an opportunity to confront all the evidence adduced against him, in particular that evidence with which the decisionmaker is familiar"). *See generally Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[t]he fundamental requirement of

due process is the opportunity to be heard at a meaningful time and *in a meaningful manner*”) (emphasis added) (internal quotation marks omitted).

In sum, Qwest requests that the Commission grant its request to modify the protective orders in WC Docket Nos. 04-223, 05-281, 06-109, 06-172, and 07-97. As noted, Qwest’s opening Tenth Circuit brief will likely be due in early November 2010. Qwest thus respectfully asks that the Commission grant the requested relief by October 1, 2010 so that Qwest has access to the unredacted versions of the Commission’s orders while preparing its brief. Otherwise, Qwest may need to seek appropriate relief from the Tenth Circuit itself, to preserve the integrity of the court’s review authority.

Respectfully submitted,

/s/ Jonathan E. Nuechterlein

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*Counsel for Qwest Corporation*

September 16, 2010

## **Attachment A**

**Email from J.G. Harrington, Counsel to Cox,  
to Heather Zachary and Elvis Stumbergs,  
Counsel to Qwest  
(Sept. 3, 2010)**

## Stumbers, Elvis

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**From:** Harrington, J.G. [JHarrington@dowlohn.com]  
**Sent:** Friday, September 03, 2010 5:35 PM  
**To:** Zachary, Heather  
**Cc:** Stumbers, Elvis  
**Subject:** Re: Cox Communications - Consent Requested  
**Attachments:** Dow Lohnes PLLC; ATT1271227.htm

I have discussed this with my client and Cox is willing to consent to modification of the Omaha protective order, but not the 4-MSA or 6-MSA order, given that both petitions were withdrawn.

J.G.

Sent from my iPhone

On Aug 30, 2010, at 11:01 AM, "Zachary, Heather" <[Heather.Zachary@wilmerhale.com](mailto:Heather.Zachary@wilmerhale.com)> wrote:

Good morning, J.G. --

I hope that you had a nice weekend. The 4-MSA order is relevant to Qwest's current appeal of the *Phoenix Forbearance Order* in a number of ways.

First, the Phoenix order contains numerous references to the 4-MSA order, and the only way for the court to understand the relationship between the two orders is to see them both in their entirety. Similarly, the only way for the court to understand why the D.C. Circuit remanded the 4-MSA order is to see exactly what that order said. The subsequent history of the 4-MSA order is irrelevant for these purposes. In any event, the D.C. Circuit did not vacate the 4-MSA order, but instead merely remanded it. Qwest's subsequent withdrawal of its petition on remand does not somehow deprive the order of all precedential value, any more than a non-vacated district court order early in a proceeding would be deprived of all precedential value merely because the case was appealed and then subsequently settled.

I hope this helps you understand our reasoning for seeking modification of the 4-MSA protective orders. If you have any additional questions, please feel free to contact me at this email address or the phone number below.

Best,

Heather

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**From:** Harrington, J.G. [mailto:[JHarrington@dowlohnes.com](mailto:JHarrington@dowlohnes.com)]  
**Sent:** Friday, August 27, 2010 2:55 PM  
**To:** Stumbergs, Elvis  
**Cc:** Zachary, Heather  
**Subject:** RE: Cox Communications - Consent Requested

This message from the law firm of Dow Lohnes PLLC, may contain confidential or privileged information. If you received this transmission in error, please call us immediately at (202)776-2000 or contact us by E-mail at [admin@dowlohnes.com](mailto:admin@dowlohnes.com). Disclosure or use of any part of this message by persons other than the intended recipient is prohibited.

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I will discuss this with my client.

However, I note that the original order in the Qwest 4-MSA proceeding was remanded by the U.S. Court of Appeals and that the proceeding now has been terminated at Qwest's request. Can you explain the rationale for using information from that order, which would appear to have no precedential value in light of those later events, in the current appeal? That would be helpful to us in determining whether we will consent to use of the confidential information.

Thanks.

**J.G. Harrington**